No. 11,210

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. JOHNSTON,
Warden, United States Penitentiary,
Alcatraz, California,
Appellant,

vs.

WALTER McDONALD,
Appellee.

OPENING BRIEF FOR APPELLANT.

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", discharging appellee from the custody of the appellant. (Tr. 73-78.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U. S. C. A., Sections 451, 452 and 453. Jurisdiction to review the order of the Court below is conferred upon this Court by Title 28 U. S. C. A., Sections 463 and 225.

STATEMENT OF FACTS.

This is an appeal from an order of the Court below discharging appellee from the custody of the appellant. (Tr. 73-78.) The appellee, an inmate of the United States Penitentiary at Alcatraz Island, California, filed a petition for writ of habeas corpus in which he alleged in substance that he was denied his constitutional right of effective assistance of counsel before the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called "the trial Court" and that accordingly his case was governed by the Supreme Court of the United States in

Glasser v. United States, 315 U. S. 60,

and he was therefore entitled to his discharge from the custody of the appellant, the Warden of the said penitentiary. (Tr. pp. 2-68.) The Court below issued an order to show cause (Tr. 68), and appellant filed a return to the order to show cause (Tr. 69, 70) and the appellee filed a traverse to the return to order to show cause. (Tr. 70-71.) The Court below then entered an order appointing counsel for appellee (Tr. 72) and both counsel for appellee and for appellant submitted memoranda of points and authorities in support of their respective contentions. Thereafter the Court below, without first issuing a writ of habeas corpus and producing the appellee before it for hearing to determine if the facts alleged by appellee were true and to afford the appellant the opportunity to controvert the facts as alleged by the said appellee, concluded that the appellee had been denied effective

assistance of counsel during the proceedings before the trial Court, that his case fell within the class of cases contemplated by

Glasser v. United States, supra,

and entered the following order:

"MEMORANDUM AND ORDER DENYING MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS AND REMANDING THE CASE AGAINST PETITIONER TO THE DISTRICT COURT OF MICHIGAN FOR FURTHER PROCEEDINGS.

Petitioner seeks release from the United States Penitentiary at Alcatraz upon the ground that he was denied his constitutional right of assistance of counsel at the time of his trial upon the charge for which he is imprisoned.

Petitioner with another defendant was indicted in the District Court of the United States for the Eastern District of Michigan, Southern Division, charged with violation of Title 12 USCA ss 588b(a) and 588b(b). Each was found guilty and was sentenced on January 26, 1939 to a term of imprisonment of 35 years.

Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed.

Petitioner contends that his case is governed by Glasser v. United States, 315 U. S. 60.

Respondent in moving to dismiss contends that petitioner knew of this point, which he now raises for the first time, when he filed his petition, No. 23414-S which was denied by this Court on August 29, 1944 (affirmed 149 F. (2d) 768), and that he is therefore barred from asserting the point under Swihart v. Johnston, decided by the Ninth Circuit Court of Appeals on August 6, 1945. Respondent also urges that the very point petitioner now raises, namely that he was denied assistance of counsel was decided adversely to him in 113 F. (2d) 984 and 129 F. (2d) 196, and that this Court should follow the ruling of the Tenth Circuit Court.

In the Glasser case, supra, Glasser, a former Assistant United States Attorney was found guilty of conspiracy to defraud the United States and appealed. At the time of trial Glasser's counsel was appointed by the court to represent one of the codefendants. Glasser objected to the appointment of his attorney to represent a co-defendant, but the appointment was made and the trial had. The Supreme Court said, page 70: '* * * we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U. S. 45, so are we clear that the

"assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired. * * * We are told that, since Glasser was an experienced attorney, he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objection at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to a consideration of his right to the protection of the Sixth Amendment. His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel. Johnston v. Zerbst, 304 U. S. 458, 464. But it is by no means conclusive. Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. * * * The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused.' The conviction of Glasser was set aside and he was remanded to the court for a new trial.

The language of the Swihart case, supra, relied on by respondent, is to the effect that if facts are

known to the petitioner and they are not alleged in his first petition he should not be allowed to file another petition based upon the same matters, for 'to reserve them for use in a later proceeding "was to make an abusive use of the writ of habeas corpus" '. The court said: 'Each petition is to be disposed of in the exercise of a sound judicial discretion guided and controlled by whatever has a rational bearing on the propriety of the discharge sought. One of the matters which may be considered and given controlling weight is prior refusal to discharge on a like petition'. The rule stated may be invoked where there is a repetitious filing, but if the point raised by the petitioner is one which affects his substantial legal rights, although known and not urged in a prior petition, the trial court should take judicial cognizance of it.

As we have seen, the point of assistance of counsel has not been heretofore raised in this court by petitioner. And respondent points out that in McDonald v. Hudspeth, 113 F. (2d) 984 and in McDonald v. Hudspeth, 129 F. (2d) 196 the Circuit Court of Appeals for the Tenth Circuit decided that petitioner did have assistance of counsel. The first case was decided before the Supreme Court's decision in the Glasser case. The second case was decided after, but there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the Glasser case or its decision would have been otherwise.

Here we have a layman charged with a serious crime who informs the court that he has had diff-

erences with his attorney. No inquiry is made by the court into the nature or seriousness of the differences, or whether or how these differences might affect the defense offered in behalf of the defendant. It seems clear that this case comes squarely within the holding in the Glasser case. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. * * * No such concern on the part of the trial court for the basic rights of (McDonald) Glasser is disclosed by the record before us.'

Applying the ruling in the Glasser case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the 'requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.' Johnston v. Zerbst, 304 U. S. 458, 468.

In conformity with the rule mentioned in In re Bonner, Pet., 151 U. S. 242, 261, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, for further action by that Court.

It is therefore Ordered:

1. That Walter McDonald, petitioner herein, be and he is hereby remanded to the custody of the United States Marshal for the Northern District of California, to be returned to the United States District Court for the Eastern District of

Michigan, Southern Division, for further proceedings on the said indictment.

2. The motion to dismiss is Denied.

Dated: September 20, 1945.

A. F. St. Sure,
United States District Judge."

(Tr. pp. 73-78.)

From the order discharging the appellee from his custody, the appellant appeals to this Honorable Court. (Tr. 78-79.)

CONTENTIONS OF APPELLANT.

The five points designated by the appellant as the grounds to be relied on by him on appeal (Tr. 132-133) may be summarized as follows:

(1) The Court below should have issued a writ of habeas corpus and produced the appellee before it for hearing to determine if the facts as alleged by appellee were true and to afford the appellant the opportunity to controvert the facts as alleged by the appellee.

(2) The Court below should not have concluded that the appellee was denied the effective assistance of counsel before the trial Court and ordered appellee discharged from the custody of appellant.

ISSUES OF THE CASE.

Did the Court below act properly in adopting the procedure which it followed, and if so, was the decision it reached, the correct one?

ARGUMENT OF APPELLANT.

It must be conceded that the mere filing of a petition for writ of habeas corpus, whether verified or unverified, does not import truth to its allegations, nor is such verity imported by the issuance of an order to show cause or by the filing of a return to order to show cause. In fact the filing of the return puts in issue every material allegation of the petition, and if a cause of action has been stated, a writ of habeas corpus must of necessity issue, the petitioner produced before the Court and a hearing held, so that it may ascertain the truth or falsity of the disputed allegations and draw the proper conclusion from such determination of the facts.

Dorsey v. Gill, 148 F. (2d) 857, 866, 870, 871;
Walker v. Johnston, 312 U. S. 275, 284.

In *Holiday v. Johnston,* 313 U. S. 342, 354, it was said by the Supreme Court of the United States:

> "The District Judge should himself have heard the prisoner's testimony, and in the light of it, and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the Judge, which the statute plainly accords him."

It therefore logically follows that if under the statute the appellee must be accorded the right to be heard by the Court below, the privilege of controverting the allegations of the appellee must be afforded to the appellant.

Appellant admits that if there is a single exception to the above-stated rule, such exception is correctly set forth in

Dorsey v. Gill, supra, at pages 869, 870,

wherein the Court citing

Salinger v. Loisel, 265 U. S. 224, 232;

Pope v. Huff, 141 F. (2d) 727, 728;

Beard v. Bennett, 114 F. (2d) 578, 581;

Wells v. United States, 318 U. S. 257, 260,

and other authorities upon which appellant herein also relies, declares:

> "It is apparent, therefore, that the words of the statute—*from the petition itself*—include information, available to the judge by judicial notice, to which the allegations of the petition refer, or upon which they depend; it is the duty of the judge to look through the petition, to the record, in order that he may discover such information; having done so, the exercise of sound judicial discretion may require that the petition be dismissed or leave to file it denied. In fact, this power and duty of the judge extends not only to the records of his own court, but to those of other courts as well."

This doctrine of the effect of the filing of a prior petition, upon an instant petition, so clearly enunciated in

Dorsey v. Gill, supra,

finds sanction in later decisions of this Court, and more particularly in

Swihart v. Johnston, 150 F. (2d) 721,

cited subsequently in

Garrison v. Johnston, 151 F. (2d) 1011.

In view of the foregoing decisions, it is now possible to see the only conceivable theory under which the Court below acted in reaching the conclusion that appellee had been denied the right of effective assistance of counsel before the trial Court without first issuing a writ of habeas corpus and holding a hearing thereon. It took judicial notice of the record in an earlier habeas corpus proceeding instituted by the appellee, decided adversely to him, of necessity conceded the facts as found by the District Court of the United States for the District of Kansas and affirmed by the Circuit Court of Appeals for the Tenth Circuit in these proceedings,

McDonald v. Hudspeth, 129 F. (2d) 196,

to be true; but while adopting these facts as a correct statement as to what had actually transpired before the trial Court, it reached an opposite conclusion from that of these Courts. Otherwise how could the Court below have possibly been justified in speaking, as it did, in its memorandum and order, of what "the undisputed facts show" (Tr. 73), in view of this unquestioned rule of law set forth in

Dorsey v. Gill, supra, at page 871:

> "When such a petition, accompanied by a request for leave to file, is presented to a trial

> judge he must determine its sufficiency, with respect both to law and fact, not only upon the allegations well pleaded, but upon the whole record. For this purpose the record in the earlier proceedings imports verity; it is treated as part of the record in the later proceeding; and only to the extent that the allegations of the petition in the later proceeding are consistent with the record, will they be assumed to be true."

Accordingly, in determining whether appellee had been denied effective assistance of counsel before the trial Court, and thus had been deprived of due process of law, the record in

McDonald v Hudspeth, supra,

must be carefully scrutinized rather than the allegations in the instant petition. Such scrutiny will of course show that the facts, as found by the Court below, are practically supported by the record in

McDonald v. Hudspeth, supra,

but the Court below should have made additional findings. Said the Court below in its opinion:

> "Undisputed facts show that at the trial, after the jury had been impaneled, petitioner stated to the court that he had had a disagreement with his attorney. The court did not inquire into the nature of the disagreement. The facts further show that prior to the trial petitioner had filed a complaint with the State Bar of Michigan alleging that his attorney was guilty of violation of professional ethics. This complaint was thereafter heard on March 10, 1939 and dismissed." (Tr. 73.)

Said the Circuit Court of Appeals for the Tenth Circuit in

McDonald v. Hudspeth, supra at pages 198 and 199,

"The trial Court found that petitioners (McDonald and his codefendant) were represented by Mr. Curran, competent counsel of their own choice, * * *; that McDonald did not state to Judge Moinet (the trial Judge) the nature of his disagreement with Curran, did not ask for a continuance, and did not request that another counsel be appointed; that Judge Moinet gave McDonald full opportunity to state the nature of his disagreement, but that the only statement made was that McDonald had had some disagreement with Curran; that no request was made by petitioners or their counsel for process for witnesses; that at no time during the trial did petitioners make any complaint to the Court respecting the conduct of their defense by Curran; that McDonald did not state to Judge Moinet that he had filed charges against Curran with the Michigan State Bar Association * * *."

Whether the facts as found by the Court below are similar or particularly similar, or otherwise, to the facts as found in

McDonald v. Hudspeth, supra,

the important consideration is, that for purpose of this appeal the Court below adopted the findings of fact as established in this prior habeas corpus proceeding, but as indicated, reached the opposite conclusion, and did so under the authority of

Glasser v. United States, supra.

Thus, in the final analysis, this Honorable Court is called upon to decide whether the action of the Court below, or the action of the Circuit Court of Appeals for the Tenth Circuit, should be sustained. The Court below, however, did not believe that its action in holding that appellee had been denied due process of law, as contemplated by the Sixth Amendment, was tantamount to a reversal of the decision of the Circuit Court of Appeals for the Tenth Circuit, for, as it said in its opinion:

> "And respondent points out that in McDonald v. Hudspeth, 113 F. (2d) 984 and in McDonald v. Hudspeth, 129 F. (2d) 196 the Circuit Court of Appeals for the Tenth Circuit decided that petitioner did have assistance of counsel. The first case was decided before the Supreme Court's decision in the Glasser case. The second case was decided after, but there is no reference to it in the decision of the Circuit Court. It is probably that the attention of the Circuit Court was not called to the Glasser case or its decision would have been otherwise." (Tr. 76.)

The appellant is reluctant to challenge the assertion of the Court below, that the attention of the Circuit Court of Appeals for the Tenth Circuit was probably not called to the ruling of the Supreme Court of the United States in the

Glasser case, supra,

"or its decision would have been otherwise." Appellant, however, respectfully insists that the decision in the *Glasser* case was before the Circuit Court of

Appeals for the Tenth Circuit when it rendered its own decision in

McDonald v. Hudspeth, supra.

This Honorable Court, taking judicial notice of the entire record in

McDonald v. Hudspeth, supra,

will find that the *Glasser* case was argued before the Circuit Court of Appeals for the Tenth Circuit and was cited by the petitioner in his opening brief at pages 9, 15 and 16, and in his unsuccessful motion for rehearing.

Now there can be no argument on the following score: the Court below decided that the appellee was denied effective assistance of counsel before the trial Court and based its decision solely on the ruling in the *Glasser* case, supra, because it said in its memorandum ordering the discharge of the appellee:

> "Applying the ruling in the Glasser case to the facts presented here, I feel constrained to hold that petitioner was denied his constitutional right to assistance of counsel. If the 'requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus.' Johnston v. Zerbst, 304 U. S. 458, 468.
>
> In conformity with the rule mentioned in In re Bonner, Pet., 151 U. S. 242, 261, the discharge of the petitioner will be delayed and he will be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, for further action by that Court." (Tr. 77.)

The Circuit Court of Appeals for the Tenth Circuit, however, did not believe that the proceedings before the trial Court brought this case within the framework contemplated by the *Glasser* case, supra, although it made no reference to the *Glasser* case in its opinion, and sustained the District Court of the United States for the District of Kansas in concluding that,

> "The petitioner was not denied the assistance of competent counsel for his defense."
>
> *McDonald v. Hudspeth,* supra, at page 198.

And of paramount importance is the fact that the Supreme Court of the United States in these proceedings denied certiorari,

> *317 U. S., 665.*

This, then, is the crux of this appeal: does the ruling in the *Glasser* case, supra, cover the situation as presented in the case at bar? Appellant respectfully contends that it does not and that under its authority appellee is not entitled to his discharge from the custody of the said appellant.

While the decision in the *Glasser* case, supra, seems to indicate that the defendant is entitled to effective assistance of counsel, it does not follow that the mere fact he was represented by an attorney against whom he had preferred charges with the Grievance Committee of the State Bar shows he did not receive competent legal assistance. In the *Glasser* case, supra, the Supreme Court took great pains to point out that Glasser was in fact deprived of competent and effective assistance of counsel by the Court's appointment

of his counsel to represent another defendant. Instances occurring during the trial were referred to by the Court to illustrate the prejudice to Glasser through his attorney being required to represent two clients. There is nothing in the record which shows that anywhere during the trial of the case at bar appellee was prejudiced by having to accept the services of his counsel or that his attorney did not in fact defend him to the best of his ability. In fact the Circuit Court of Appeals for the Tenth Circuit in

McDonald v. Hudspeth, supra,

indicates, as already shown, that the defendant received competent and unprejudiced assistance by counsel who represented him. In

Dorsey v. Gill, supra, at page 876,

it was said:

> "Everyone who is acquainted with the realities of practice knows the desire of some convicted persons to have their cases tried over again and their frequent repudiation of counsel after their hopes for acquittal or for lenient punishment have failed to materialize. It is easy for such a person to rationalize his own wishful thinking—together with hopeful comments of counsel—into a structure of promises, coercion and trickery; to assume incompetency and disinterest or worse, upon the part of counsel. But mere general assertions of incompetency or disinterest do not constitute a prima facie showing required by the statute to support a petition for habeas corpus. District attorneys and assigned counsel are officers of the court; licensed to practice, upon proof of character and fitness to perform professional du-

ties. There is a presumption of proper performance of duty by each of them, which requires much more than the allegations of the present case to set the procedure of habeas corpus in motion."

SUMMARY.

None of the allegations of appellee in his petition are deemed true, except as they are consistent with the record of

McDonald v. Hudspeth, supra.

If the findings of fact, as made by the District Court of the United States for the District of Kansas and affirmed by the Circuit Court of Appeals for the Tenth Circuit in

McDonald v. Hudspeth, supra,

are deemed as true, the Court below acted improperly in concluding from these facts that, as a matter of law, the appellee was denied his right to effective assistance of counsel before the trial Court.

Appellant is glad to rest on the record in

McDonald v. Hudspeth, supra,

and with that understanding he concedes that no writ of habeas corpus need issue and hearing held thereon. Under any circumstances the Court below acted improperly in ordering appellee discharged from the custody of appellant.

CONCLUSION.

This Honorable Court should conclude from the record that the appellee was not denied the effective assistance of counsel before the trial Court and should remand the cause to the Court below with instructions that the petition for writ of habeas corpus be dismissed.

In the alternative, this Honorable Court should remand the cause to the Court below with instructions that it issue a writ of habeas corpus and hold a hearing thereon.

Accordingly the decision of the Court below ordering the discharge of the appellee from the custody of the appellant was improper and should therefore be reversed.

Dated, San Francisco, California,
May 20, 1946.

Respectfully submitted,

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